Sitrac Corp Sdn Bhd & Anor v Dato' Syed Hamzah bin Syed Abu Bakar (deceased) (representative appointed, Syed Sazlee bin Syed Hamzah) & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-623–11 OF 2019
LIZA CHAN JC
28 OCTOBER 2021

Civil Procedure — Discovery — Application for — Whether there were documents — Whether documents relevant and necessary — Whether application for discovery was 'fishing expedition' — Whether documents in possession, custody, or power of first defendant — Whether documents necessary either for disposing fairly of the matter or for saving costs — Whether documents were privileged documents — Whether documents required by other parties — Whether there was imminent necessity for documents to be disclosed — Evidence Act 1950 s 57 — Rules of Court 2012 O 24 rr 3(4), 7 & 13(1)

The first defendant had applied to the Companies Commission of Malaysia ('the second defendant') for the rectification of 75,000 shares in the first plaintiff on the ground that the transfer of the said shares to the second plaintiff was without authorisation by the third defendant and there was no consideration paid ('the rectification application'). The second defendant refused the rectification application, hence, the first defendant filed originating summons ('OS 131') against the second defendant's decision which application was allowed by the court ('the court's order'). The plaintiffs then filed application to impugn the court's order and/or to strike out OS 131 in its entirety on the ground that the first defendant had practised deception on the court through deliberate and conscious concealment of evidence relevant and material in OS 131 in obtaining the court's order. In the proceeding, the court had decided that the first defendant was unable to testify based on the testimony of Dr Soraya stating that the first defendant suffered dementia. It ought to be noted that there was an affidavit by one Khoo Kiam Chong's stating that he and his son, Ruben Khoo had been appointed by the first defendant to act as his attorneys pursuant to an irrevocable power of attorney ('the PA') dated 19 May 2016. Subsequently, the third defendant filed an application for discovery ('encl 135') against the first defendant pursuant to O 24 r 7 of the Rules of Court 2012 ('the ROC'). The documents sought to be discovered were the medical reports and diagnosis ('items 1, 2 and 3') in relation to the first defendant's dementia by Dr Soraya, Tengku Mizan Hospital and General Hospital Kuala Lumpur; the first defendant's declaration of trust dated 13 May 2016 ('item 4'); and the warrant to act and/or any similar

appointment of solicitors executed by the first defendant in relation to the appointment of the first defendant's former solicitors, Messrs Thomas Phillip and Messrs Kanesalingam & Co to represent the first defendant ('item 5'). The counsel for the first defendant argued that encl 135 was a 'fishing expedition'.

Held, allowing encl 135:

(1) The burden was on the third defendant to satisfy the court that the production of the documents was necessary to dispose fairly of the cause or matter or to save costs under O 24 r 13(1) of the ROC (see para 28).

(2) In relation to item 1, the court found that premised on Dr Soraya's detailed testimony, she would have made notes when the first defendant first visited her with his son. Regarding item 2 and item 3, pursuant to s 57 of the Evidence Act 1950, the court was entitled to take judicial notice that hospitals do keep a file of each of their patients. As for item 5, the court may similarly take judicial notice that solicitors were mandated by law to have a document retention and destruction policy to which the client's documents were subject. Lastly, the trust deed in item 4 was referred to in the PA produced in Khoo Kiam Chong's affidavit. Therefore, the court found that there were documents to fulfil the first test in the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96 for all the documents sought (see paras 30–31 & 33–34).

(3) The core issue in this action related to whether the first defendant practiced fraud and/or deception and/or non-disclosure and/or concealment against the court in OS 131 through deliberate and conscious concealment of relevant and material evidence in obtaining the court's order. As it could not be gainsaid that a person under disability was precluded from bringing or defending an action except by his litigation representative, the court was inclined to accept the third defendant's arguments that the documents sought to be discovered were relevant and necessary for determination of the core issue and to determine: (a) the first defendant's mental capacity or incapacity; (b) whether there was a deliberate concealment of the first defendant's condition; (c) whether first defendant could manage his own affairs; and (d) whether instructions for the conduct of OS 131 were being taken from Khoo Kiam Chong (see paras 35– 36).

(4) Having specifically described the documents sought to be discovered, the third defendant's application herein could not be said to be a 'fishing expedition'. In testing the materiality of the discovery to a particular issue, it was the case of the party seeking the discovery that must be assumed to be true (in this case the third defendant), and not that of the party from whom the discovery was sought (see paras 37–38).

(5) Based on the evidence, the documents were indisputably in the possession, custody, or power of the first defendant and the documents 'are necessary or desirable' for the fair disposal of the plaintiffs' claim against the defendants and would save costs. In addition, first defendant did not claim that the documents sought were privileged documents. Further, not just the third defendant but the plaintiffs and the second defendant also required the documents sought to be discovered, which was entirely in accord with O 24 r 3(4) of the ROC. The court therefore satisfied that the third defendant had shown there was an imminent necessity for the documents to be disclosed (see paras 39 & 41–44).

[Bahasa Malaysia summary

Defendan pertama telah memohon kepada Suruhanjaya Syarikat Malaysia ('defendan kedua') untuk membetulkan 75,000 saham dalam plaintif pertama atas alasan pemindahan saham tersebut kepada plaintif kedua adalah tanpa kebenaran oleh defendan ketiga dan tanpa balasan bayaran ('permohonan pembetulan'). Defendan kedua menolak permohonan pembetulan tersebut, justeru, defendan pertama memfailkan saman pemula ('OS 131') terhadap keputusan defendan kedua yang mana permohonan tersebut dibenarkan oleh mahkamah ('perintah mahkamah'). Plaintif kemudiannya memfailkan permohonan untuk mencabar perintah mahkamah dan/atau untuk membatalkan OS 131 secara keseluruhan atas alasan defendan pertama telah melakukan penipuan di mahkamah melalui penyembunyian secara sengaja dan sedar ke atas keterangan yang relevan dan material dalam OS 131 dalam mendapatkan perintah mahkamah tersebut. Dalam prosiding tersebut, mahkamah telah memutuskan bahawa defendan pertama tidak dapat memberi keterangan berdasarkan keterangan Dr Soraya yang menyatakan defendan pertama mengalami demensia. Perlu diingatkan bahawa terdapat afidavit oleh seorang Khoo Kiam Chong yang menyatakan bahawa dia dan anaknya, Ruben Khoo telah dilantik oleh defendan pertama untuk bertindak sebagai wakilnya berdasarkan Surat Kuasa Wakil Yang Tidak Boleh Dibatalkan ('PA tersebut') bertarikh 19 Mei 2016. Selepas itu, defendan ketiga memfailkan permohonan untuk penzahiran ('lampiran 135') terhadap defendan pertama menurut A 24 k 7 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Dokumen-dokumen yang ingin dizahirkan ialah laporan perubatan dan diagnosis ('item 1, 2 dan 3') berhubung demensia defendan pertama oleh Dr Soraya, Hospital Tengku Mizan dan Hospital Besar Kuala Lumpur; pengisytiharan amanah defendan pertama bertarikh 13 Mei 2016 ('item 4'); dan waran untuk bertindak dan/atau apa-apa pelantikan peguam cara yang serupa yang dilaksanakan oleh defendan pertama berhubung dengan pelantikan bekas peguam cara defendan pertama, Tetuan Thomas Phillip dan Tetuan Kanesalingam & Co untuk mewakili defendan pertama ('item 5'). Peguam bagi defendan pertama berhujah bahawa lampiran 135 adalah 'ekspedisi memancing'.

Diputuskan, membenarkan lampiran 135:

(1) Beban terletak pada defendan ketiga untuk memuaskan hati mahkamah bahawa penzahiran dokumen-dokumen tersebut adalah perlu untuk melupuskan kausa atau tindakan tersebut secara adil atau untuk menjimatkan kos di bawah A 24 k 13(1) KKM (lihat perenggan 28).

(2) Berhubung item 1, mahkamah mendapati berdasarkan keterangan terperinci Dr Soraya, pastinya dia akan membuat nota ketika defendan pertama melawatnya bersama anaknya. Mengenai item 2 dan item 3, menurut s 57 Akta Keterangan 1950, mahkamah berhak untuk mengambil notis kehakiman bahawa hospital menyimpan fail setiap pesakit mereka. Bagi item 5, mahkamah juga boleh mengambil notis kehakiman bahawa peguamcara diberi mandat oleh undang-undang untuk mempunyai polisi pengekalan dan pemusnahan dokumen klien. Akhir sekali, surat ikatan amanah dalam item 4 telah dirujuk dalam PA tersebut yang dikemukakan dalam afidavit Khoo Kiam Chong. Oleh itu, mahkamah mendapati terdapat dokumen-dokumen untuk memenuhi ujian pertama dalam kes *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96 bagi semua dokumen-dokumen tersebut (lihat perenggan 30–31 & 33–34).

(3) Isu teras dalam tindakan ini berkaitan dengan sama ada defendan pertama mengamalkan fraud dan/atau penipuan dan/atau ketidakdedahan dan/atau penyembunyian terhadap mahkamah dalam OS 131 melalui penyembunyian yang disengajakan dan sedar ke atas keterangan relevan dan material dalam mendapatkan perintah mahkamah tersebut. Oleh kerana tidak boleh dinafikan bahawa seseorang yang kurang upaya dihalang daripada memulakan atau mempertahankan tindakan kecuali oleh wakil litigasinya, mahkamah cenderung untuk menerima hujah defendan ketiga bahawa dokumen-dokumen yang ingin dizahirkan adalah relevan dan perlu untuk menentukan isu teras tersebut dan untuk menentukan: (a) keupayaan mental defendan pertama atau ketidakupayaannya; (b) sama ada terdapat penyembunyian yang disengajakan mengenai keadaan defendan pertama; (c) sama ada defendan pertama boleh menguruskan hal ehwalnya sendiri; dan (d) sama ada arahan untuk menjalankan OS 131 telah diambil daripada Khoo Kiam Chong (lihat perenggan 35–36).

(4) Setelah menerangkan secara khusus dokumen yang ingin dizahirkan, permohonan defendan ketiga di sini tidak boleh dikatakan sebagai 'ekspedisi memancing'. Dalam menguji kepentingan penzahiran kepada isu tertentu, kes pihak yang memohon penzahiran yang mesti diandaikan sebagai benar (dalam kes ini defendan ketiga), dan bukan kes pihak yang ingin dizahirkan (lihat perenggan 37–38).

(5) Berdasarkan keterangan, adalah tidak dapat dipertikaikan bahawa dokumen-dokumen tersebut berada dalam milikan, jagaan, atau kuasa

A defendan pertama dan dokumen-dokumen tersebut 'adalah perlu atau wajar' untuk pelupusan secara adil tuntutan plaintif terhadap defendan dan akan menjimatkan kos. Selain itu, defendan pertama tidak mendakwa bahawa dokumen-dokumen yang ingin dizahirkan adalah dokumen terlindung. Selanjutnya, bukan sahaja defendan ketiga tetapi B plaintif dan defendan kedua juga memerlukan dokumen yang ingin dizahirkan yang mana ini bertepatan dengan A 24 k 3(4) KKM. Oleh itu, mahkamah berpuas hati bahawa defendan ketiga telah menunjukkan terdapat keperluan segera untuk dokumen-dokumen tersebut dizahirkan (lihat perenggan 39 & 41–44).]

C

Cases referred to

Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh [2000] 5 MLJ 778, HC (refd)

D *Folin & Brothers Sdn Bhd (in liquidation) v Wong Foh Ling & Wong Swee Lin & Ors* [2001] MLJU 43, HC (refd)

Ho King Min & Anor v Lee Meng Leng & Ors [2020] MLJU 1925, HC (refd)

Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe [2017] 6 MLJ 363, CA (refd)

E *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31; [2014] 7 CLJ 597, FC (refd)

Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40, CA (refd)

Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, F *Malaysia* [2008] 3 MLJ 625, CA (refd)

The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55, CA (refd)

Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

G

Legislation referred to

Companies Act 2016 s 602(3), (4)

Evidence Act 1950 s 57

H Rules of Court 2012 O 24 rr 2, 3(4), 3(4)(b), 7, 8, 13(1)

Lim Kian Leong (Jessica Chong with him) (Lim Kian Leong) for the plaintiffs.

Mak Lin Kum (Layyin Teh bt Hassan with him) (Syed Ibrahim & Co) for the first defendant.

I *Zuriatul Mida Nor Azmi (Nor Syairah with her) (Companies Commission of Malaysia) for the second defendant.*

Jeyakumar Palakrishnar (Normadiah bt Mohammad and Barry Boey Chee Wai with him) (Zahir Jeya & Zainal) for the third defendant.

Liza Chan Sow Keng JC:

INTRODUCTION

[1] Enclosure 135 is the third defendant, Puncak Kenangan (M) Sdn Bhd ('Puncak')'s application for discovery against the first defendant pursuant to O 24 r 7 of the Rules of Court 2012 ('the ROC 2012').

[2] On 25 August 2021, the third defendant's application was allowed with costs. This judgment contains the reasons as to why encl 135 was allowed.

BACKGROUND

[3] By this action, the first plaintiff ('Sitrac') and second plaintiff ('Kelana Jati') seek to impugn a court order dated 21 May 2019 obtained by the first defendant ('D1') on 21 May 2019 against the second defendant ('SSM') and to strike out and/or set aside Originating Summons No WA-24NCC-131–03 of 2019 ('OS 131') in its entirety on the ground that the first defendant has practised deception on the court through deliberate and conscious concealment of evidence relevant and material in OS 131 in obtaining the court order dated 21 May 2019 ('impugned court order'). The plaintiffs claimed that but for such conscious and/or deliberate dishonesty and misrepresentation by D1, the court in OS 131 would not have allowed the appeal against SSM's decision and directed that SSM reconsider their decision and OS 131 would have been set aside and/or struck off.

[4] D1 holds one registered share in Puncak and no registered shares in Sitrac.

[5] SSM, the second defendant is a nominal defendant in this action, as they were a party to which the impugned court order was obtained against.

[6] Puncak, as the third defendant herein is also a nominal defendant, as they were the transferor of the 75,000 shares in Sitrac to Kelana Jati and was served and mentioned in the impugned court order.

[7] On 26 April 2018, D1 pursuant to s 602(4) of the Companies Act 2016 ('the CA 2016') applied to SSM for rectification of the register of members of the first plaintiff, Sitrac, namely, rectification of 75,000 shares in Sitrac that was transferred by Puncak to Kelana Jati on 17 April 1992, on grounds that there was no authorisation by Puncak, and no consideration was paid ('rectification application').

[8] By letter dated 20 September 2018, SSM refused D1's rectification application on the basis that it did not have the power to deal with the same as it does not concern an 'error, mistake or omission' which arose 'in the ordinary course of the discharge of the duties of the defendant' within the meaning of s 602(3) of the CA 2016, and the long delay of 25 years.

[9] D1 then filed OS 131 to appeal against the decision of the SSM in refusing his rectification application.

[10] On 21 May 2019, the court in OS 131 made an order against SSM:

> The defendant shall reconsider the plaintiff's application dated 26 April 2018 under s 602(1), Companies Act 2016, and for that purpose, the plaintiff is to give notice to Sitrac Corporation Sdn Bhd, Puncak Kenangan Sdn Bhd and Kelana Jati Sdn Bhd of his application and serve his application on the said three companies pursuant to s 602(2)(b), Companies Act 2016 (the 'Order').

[11] It was also claimed by the plaintiffs that:

(a) they were only made aware of OS 131 when they were served the impugned court order and the rectification application by D1's solicitors; and

(b) D1 did not make the plaintiffs parties to OS 131 even though he sought not only to rectify the register of the first plaintiff but also to deprive the second plaintiff of its shares in the first plaintiff.

[12] The gist of the first defendant's defence in this action is that the court in OS 131 did not consider the merits of the rectification application in making the impugned court order. So the issue of fraud, deception or non disclosure of facts do not arise.

[13] After two days of trial on 11 January 2021 and 12 January 2021 with the plaintiffs calling one witness, the plaintiffs closed their case. The trial was fixed for continuation on 8–9 April, 10–11 and 29 June 2021.

[14] On 8 April 2021, being the third day of trial, D1's counsel tendered a medical certificate issued by Dr Soraya of the Gleneagles Hospital which stated that D1 was unable to attend court for one month owing to 'dementia (estimated) to rule out acute confusional state/delirium/ depression'.

[15] When D1 could not attend court owing to the medical certificate tendered, at the request of the court, bearing in mind that the court has a duty to ensure whether D1 is fit to take the stand and to ensure or alleviate any undesirable risks of aggravating his condition, with the agreement of all parties,

Dr Soraya was then called to provide testimony on D1's medical infirmity, which she did. It was then revealed that D1 had apparently been showing signs of dementia from as far back as 2017. In her testimony, Dr Soraya suspected that D1 had dementia but a full examination was required to substantiate and confirm this diagnosis. Dr Soraya informed the court that her observations were that D1 is likely at a moderate to severe stage of dementia and that tests were being conducted to establish D1's exact medical condition and that she was waiting for the outcome of the reports. She was of the opinion that D1 is incapable of giving evidence in court and had difficulties in answering simple questions.

[16] In view of Dr Soraya's testimony on oath, it was beyond dispute that the D1 was unable to testify. The humane and expedient thing to do was for the court to vacate the April trial dates to June for D1's solicitors to sort out their authority for the continued representation of D1 and to defend the action. It was common ground that D1 was under a disability and therefore it was necessary for a litigation representative to be appointed.

[17] Meanwhile, on 15 July 2021, the third defendant filed encl 135 seeking discovery of the following:

(1) Dr Soraya Kunanayagam's medical report and diagnosis on D1's mental state/capacity and matters in respect of his mental state/capacity;

(2) Tengku Mizan Hospital's medical reports and diagnosis in regard to D1's mental state/capacity and matters in respect of his history of dementia and treatment from 2017 till present;

(3) General Hospital Kuala Lumpur's medical reports and diagnosis in regard to D1's mental state/capacity and matters in respect of his history of dementia and treatment from 2017 till present;

(4) D1's Declaration of Trust dated 13 May 2016; and

(5) the warrant to act and/or any similar appointment of solicitors executed by D1 in relation to the appointment D1's former solicitors, Messrs Thomas Phillip and Messrs Kanesalingam & Co to represent D1.

THIRD DEFENDANT'S CASE FOR DISCOVERY

[18] The third defendant's grounds for discovery are in essence:

(a) Dr Soraya's testimony raised questions on D1's mental capacity and in turn raised questions on D1's appointment of his then and former solicitors Messrs Kanesalingam & Co and Messrs Thomas Philip respectively, as to whom these solicitors were taking instructions from;

Messrs Kanesalingam & Co did not reply the third defendant's queries by letter, whilst Messrs Thomas Philip claimed solicitor-client privilege;

(b) Messrs Kanesalingam & Co attended case management on 3 June 2021 to inform that D1 has engaged new solicitors — Messrs Syed Ibrahim & Co who was represented by Mr Mak and he informed they were appointed by D1's attorney Khoo Kiam Chong;

(c) on 16 June 2021, Messrs Syed Ibrahim & Co filed a notice of change solicitors and two unaffirmed affidavits of Khoo Kiam Chong and Ruben Khoo Sheng Luen. In Khoo Kiam Chong's affidavit, he averred that he and his son, Ruben Khoo had been appointed by D1 to act as his attorneys pursuant to an irrevocable power of attorney ('PA') dated 19 May 2016. The PA was allegedly made for valuable consideration and referred to a declaration of trust which D1 is said to hold 47.5% of his interest (as set out in the PA) for Khoo Kiam Chong. It was alleged that the attorneys were duly authorised and given the power pursuant to the PA by D1 to have conduct of this matter. Khoo Kiam Chong in his unsworn affidavit stated that he was the one giving instructions for the conduct of this matter since commencement including the appointment of solicitors to represent D1; that he had never intended to put D1 as a witness; the production of the medical certificate was only meant to inform the court that D1 will not be attending as a witness; Messrs Kanesalingam & Co were instructed by Khoo that the doctor was not to give evidence on oath; and that he had agreed to the condition that she will not be called to explain the medical certificate;

(d) Messrs Syed Ibrahim & Co as D1's solicitors, has refused to produce the trust deed referred to in the PA;

(e) where D1 was under a disability, he is precluded from bringing any action, making a claim or defending himself in any proceedings except by a litigation representative;

(f) the production of the medical records is to determine not only D1's mental state and condition but also the validity of the actions taken pursuant to the PA;

(g) the trust deed ought to be produced to determine the validity of the purported PA, whether given for valuable consideration or irrevocable as contended;

(h) proceedings should be conducted transparently and that there be no surprise;

(i) the documents sought could adversely affect D1's case or support the case of the other parties; the documents sought may lead to a series of inquiry leading to information that may adversely affect D1's case or support the case of the other parties; and

(j) the documents are in the possession, custody or power of D1 and relate to the matter before the court.

D1'S OBJECTION TO DISCOVERY

[19] D1 opposed the discovery application on grounds which I have summarised as follows:

(a) the documents sought to be discovered by the third defendant are irrelevant, whether directly or indirectly, to the issues in dispute and/or the purported basis underlying the documents sought to be discovered are academic on the primary grounds that:

(i) trial of this action has already commenced and all pre-trial cause papers are settled;

(ii) the pre-trial cause papers are:
(A) issues to be tried;
(B) agreed facts;
(C) bundle of documents and pleadings; and
(D) witness lists and statements.

(b) item no 1 to no 3 of the documents sought are medical reports and documents which relate to the medical history of D1. The alleged grounds for seeking these documents became academic because:

(i) D1 has passed away. In this regard, the issue in respect of his mental capability has rested;

(ii) the issue on whether D1 is able to continue to defend in this proceedings have been resolved by the granting of encl 139 (appointment of representative); and

(iii) Messrs Syed Ibrahim & Co pursuant to the PA has filed a notice of change of solicitors and the unaffirmed affidavit of the attorney.

(c) the PA adduced, has not and did not change the nature and characteristic of this action. The trial documents remain unchanged and will be utilised by D1 during the upcoming trial on 6 September 2021;

(d) the declaration of trust referred to in the PA and sought as item 4 is not relevant to this action or the impugned court order obtained by D1 in OS 131; it would not assist this honourable court to determine the issues or prayers in this action on whether the impugned court order should be set aside;

(e) the purpose of adducing the PA (at the material time) was more time efficient as compared to the appointment of a litigation representative. The declaration of trust was never an issue raised by the parties;

A (f) this court on 5 August 2021 did not consider the PA as giving the authority to Khoo Kiam Chong to have conduct of this proceedings;

(g) in respect of the documents sought in item no 5, the son as representative of D1 has executed a warrant to act to give authority to Messrs Syed Ibrahim & Co to act as his solicitors; and

B

(h) enclosure 135 is a fishing expedition.

[20] D1 further made no admission as to custody, control and power over the documents sought and puts the third defendant to strict proof.

C

PLAINTIFFS AND SSM SUPPORT THE APPLICATION IN ENCL 135

[21] I should mention that the plaintiffs argued in support of the discovery application.

D

[22] The plaintiffs took the position that the whole basis of this action is that D1 has practised deception on the court through deliberate and conscious concealment of evidence relevant and material in OS 131 in obtaining the impugned court order. Dr Soraya's evidence showed there was a possibility that D1 was suffering from dementia since 2017 based on what the son told her; when D1 went for a walk, he did not even know how to go home. The question arise whether he had the mental capacity to instruct solicitors in OS 131 or someone else was driving the litigation by purchasing an interest in the litigation as the PA alluding to a trust deed appears to show, and this evidence was not available when the trial started.

E

F

[23] SSM on the other hand argued that as a regulatory body, although not taking sides with any party, the discovery of the documents is very important as to the mental capacity of D1 at time of the rectification application made on 26 April 2018 to cancel the 1992 transfer Form 32A in respect of the transfer of the 75,000 shares, which was also the basis for OS 131. SSM added that the discovery of the documents will have an effect on the outcome of OS 131 and to enable this action to be determined justly and fairly.

G

H

DECISION OF THE COURT

[24] In deciding encl 135, this court has to consider the parties respective positions in the light of O 24 r 8 and O 24 r 13(1) of the ROC 2012 which are produced for convenience.

I

(a) O 24 r 8 of the ROC 2012 states:

> Discovery to be ordered only if necessary (O 24 r 8)
>
> On the hearing of an application for an order under rule 3, 7 or 7A, the

> Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

(b) O 24 r 13(1) of the ROC 2012 states:

> Production to be ordered only if necessary (O 24 r 13)
>
> (1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

[25] With the deletion of the old O 24 r 2 in the ROC 2012, there is no longer automatic discovery. Since then, the trite test therefore is whether the documents in question are necessary either for disposing fairly of the matter or for saving costs. In *Ho King Min & Anor v Lee Meng Leng & Ors* [2020] MLJU 1925, I stated that the plaintiffs (who were seeking discovery in that case) do not have a free-standing right to discovery and ought to have first clearly demonstrated the necessity for the documents sought.

[26] In *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581, a leading authority on the subject of discovery of documents, Edgar Joseph Jr SCJ set out the elements the applicant has to satisfy to succeed in an application for discovery and defined what is relevant:

> The essential elements for an order for discovery are threefold; namely, *first there must be a 'document'*, secondly, *the document must be 'relevant'* and *thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought*.

[27] In *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31; [2014] 7 CLJ 597, the Federal Court determined that discovery must relate to the core issues. It held:

> 8 As for the discovery issue in the first appeal, the documents sought were not only very extensive, but irrelevant to the core issue. The documents sought only relate to the issue of quantum of damages and went nowhere towards establishing the issue of liability in the case. In the circumstances, in view of the O 14A applications herein, the learned judge was correct in holding that discovery was not necessary at that stage of the proceedings. The learned judge's decision in dismissing discovery at that stage of proceedings was in line with the underlying principle under O 24 r 4 which underscored that the discovery process was predicated on the issues involved in a particular case. It followed that, in this case, the determination of the core issue in the O 14A applications had rightly been decided to precede the discovery. It followed further that the exercise of discretion by the learned judge in the matter was in accordance with principles which did not justify this court's interference.

[28] The burden is on the third defendant to satisfy the court that the production of the documents is necessary to dispose fairly of the cause or matter suit fairly or to save costs under O 24 r 13(1) — *Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, where the Court of Appeal held:

> Under O 24 r 13(1) of the RHC, an order for the production of documents for inspection is not to be made unless the court is of the opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r 13(1). The court would dismiss a plaintiff's application for discovery if the plaintiff is merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery.

[29] Having considered the submissions of the parties and the law on the matter, in the exercise of the discretion vested in this court whether or not to make an order for discovery, I have no hesitation to allow encl 135.

[30] Firstly, premised on Dr Soraya's detailed testimony, she would have made notes when D1 first visited her with his son. She could not have testified from memory. It was her testimony that tests were being conducted to establish D1's exact medical condition and that she was waiting for the outcome of the reports. Further, she informed that D1 was seeing a psychiatrist in Tengku Mizan Hospital in 2017 and was started on Aricept, a medication used for dementia patients but the son had stopped it as D1 was getting worse. Pursuant to s 57 of the Evidence Act 1950, the court is entitled to take judicial notice that hospitals do keep a file of each of their patients.

[31] As for item 5, the warrant to act and/or any similar appointment of solicitors executed by D1, is in the nature of documents which solicitors and their client keep (in this case D1). The court may similarly take judicial notice that solicitors are mandated by law to have a document retention and destruction policy to which the client's documents are subject. Obtaining these documents in my view, will not impose an undue burden on D1.

[32] 'When a court takes judicial notice of a fact, it simply means that the court declares that it will find that the fact exists', per Abdul Malik Ishak J (as he then was) in *Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh* [2000] 5 MLJ 778.

[33] As for item 4, the trust deed was referred to in the PA produced in Khoo Kiam Chong's affidavit. In *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 3 MLJ 625, the Court of Appeal held:

> [38] Under O 24 r 10 of the RHC, the court has the jurisdiction to order discovery

of a document referred to in an affidavit, whether or not the document is in the possession, custody or power of the party in whose affidavit the reference to that document is made. The discretion is vested in the court whether or not to make an order for discovery. An order will not be made if good cause to the contrary is shown. The absence of possession, custody or power may amount to a good cause, but is not always so. At the end of the day, the decision to order discovery is dependent on the facts of each particular case.

[34] As such, I find that there are documents to fulfil the first test in *Yekambaran* for all the documents sought.

[35] Secondly, it is to be borne in mind that the core issue in this action as agreed by the parties in encl 51 (common issues to be tried) relates to whether D1 practiced fraud and/or deception and/or nondisclosure and/or concealment against the court in OS 131 through deliberate and conscious concealment of relevant and material evidence in obtaining the order dated 21 May 2019 in OS 131.

[36] As it cannot be gainsaid that a person under disability is precluded from bringing or defending an action except by his litigation representative, I am inclined to accept the third defendant's arguments that the documents sought to be discovered are relevant and necessary for determination of the core issue and to determine:

(a) D1's mental capacity or incapacity; the issue is not limited to whether D1 is able to continue to defend this action;

(b) whether there was a deliberate concealment of D1's condition;

(c) whether D1 could manage his own affairs; and

(d) whether instructions for the conduct of OS 131 were being taken from Khoo Kiam Chong.

[37] Thirdly, having specifically described the documents sought to be discovered, the third defendant's application herein could not be said to be a 'fishing expedition' — *Ong Boon Hua @ Chin Peng & Anor* where the Court of Appeal said:

[21] The respondents/defendants were not on a fishing expedition to discover Chin Peng's documents because they have been very specific as to what they were requesting for disclosure. This was certainly unlike the case of *Datuk Amar James Wong Kim Min & Anor v Pendaftar Pertubuhan* [2004] 6 MLJ 235 where the court refused discovery because the documents were already before the court and the applicants there were said to be on a fishing expedition.

[38] In testing the materiality of the discovery to a particular issue, it is the case of the party seeking the discovery that must be assumed to be true (in this case the third defendant), and not that of the party from whom the discovery is sought. In this regard, the High Court in *Yekambaran* observed as follows:

> The observation of Edward Bray in his highly regarded work on discovery at p 18 as to the test of 'materiality' merits quotation; there he says this:
>
> > ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.
>
> I note that proposition received judicial approval in *Format Communications Mfg Ltd v ITT (UK) Ltd* [1983] FSR 473 (CA).
>
> In determining the question of relevance, therefore, I would have to apply the principles to be distilled from the authorities which I have cited.
>
> I considered that it was incumbent for the plaintiff to set out the wrong he believes he has suffered, the reason why he believes this to be so and why it is necessary that the defendant be ordered to give discovery.

[39] Fourthly, the documents sought by the third defendant for discovery against D1 are indisputably in the possession, custody, or power of D1. D1 has not denied in his affidavit in reply that the documents sought by the third defendant are in his possession, custody, or power. In defining the term 'possession', 'custody' and 'power', Abdul Malik Ishak J (as he then was) in *Folin & Brothers Sdn Bhd (in liquidation) v Wong Foh Ling & Wong Swee Lin & Ors* [2001] MLJU 43 quoted from *Halsbury's Laws of England* (4th Ed, Vol 12) at para 39 as follow:

> *Halsbury's Laws of England* (4th Ed, Vol 12) at para 39 defines *'possession' to mean 'the physical or corporeal holding of the document pursuant to a legal right to its possession* ...'; while *'custody' is defined as 'the mere actual physical or corporeal holding of a document, regardless of its right to possession*'; and the term *'power' 'means an enforceable right to inspect the document or to obtain possession or control of it from the person who ordinarily has it in fact'*. (Emphasis added.)

[40] In my utmost respectful view, even if D1 does not have the documents, he has the 'power' to obtain possession or control of them from the persons who have them. There is also nothing preventing him from exercising that power.

[41] Fifthly, the documents sought by the third defendant for discovery against D1 in my judgment 'are necessary or desirable' for the fair disposal of the plaintiffs' claim against the defendants and will save costs:

(a) the documents will assist this honourable court in determining the plaintiffs' claim against the defendants as to whether there was fraud and/or deception and/or nondisclosure and/or concealment against the

court in OS 131 through deliberate and conscious concealment of relevant and material evidence in obtaining the order dated 21 May 2019 in OS 131;

(b) given the developments that have unfolded in the midst of trial through Dr Soraya's testimony, I cannot shut my eyes nor ignore the troubling questions of critical importance that the impugned order obtained against SSM in OS 131 may have been obtained while D1 was incapable of managing and 19 administering his affairs; I accept the third defendant's submission, supported by those of the plaintiffs and SSM, that the documents sought will go towards the train of inquiry as to whether there was any impropriety in obtaining the impugned court order in OS 131, which is the nub of the plaintiffs' claim, hence material, necessary & relevant. In this regard, it is apt to cite *Ong Boon Hua @ Chin Peng & Anor*, where the Court of Appeal in its judgment, referred to the case of *The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55 where Bret LJ set out the principles of law governing discovery as follows:

> The documents to be produced are not confined to those which would be evidence either to prove or disprove any matter in question in the action ... It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, *contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary*, *if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences* ... (Emphasis added.)

(c) the documents sought will throw light on the matter and if so, the discovery application is properly instituted. As stated by Justice Mary Lim JCA (later FCJ) in *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe* [2017] 6 MLJ 363:

> If the documents can shed some light as to the question which vexes the applicant, in this case the respondent, as to whether he has a viable claim for being terminated as a beneficiary, then the application is properly initiated.

(d) further, the documents may also be relied on by the second defendant, the third defendant and the plaintiffs to demolish the defence raised by D1 against the plaintiffs' claim; conversely, it was open to D1 to use the documents to support its defence of the plaintiffs' claim; and

(e) this action by the plaintiffs may then be disposed fairly, save judicial time and costs because parties may rely on the same documents to prove their claims and defences. In any event, even if it may not save judicial costs,

A it is sufficient for the third defendant to fulfil either one of the requirements that is whether the documents are necessary to fairly dispose the action or to save costs.

B **[42]** Sixthly, D1 did not claim that the documents sought are privileged documents. The Court of Appeal in *Ong Boon Hua @ Chin Peng & Anor* observed that privilege may be a good cause not to allow discovery in the event that the documents upon which a discovery is sought for is classified as privileged documents:

C > Privilege may be a good cause not to allow discovery. Thus, the party against whom the order is sought will be excused if, and only if, he is privileged from producing the document asked for (*Roberts v Oppenheim* (1884) 26 Ch D 724; and *Milbank v Milbank* [1900] 1 Ch 376). And 'privilege' has not been raised by Chin Peng. At any rate, Chin Peng's documents can never be classified as privileged so as to prevent him from producing them.

D

[43] I am therefore satisfied that the third defendant had shown there is an imminent necessity for the documents to be disclosed.

E **[44]** As stated earlier, not just the third defendant but the plaintiffs and SSM also require the documents sought to be discovered, which is entirely in accord with O 24 r 3(4) of the ROC 2012 which reads:

> 3(4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:
>
> F (a) the documents on which the party relies or will rely; and
>
> (b) the documents which could —
>
> (i) *adversely affect his own case*;
>
> G (ii) *adversely affect another party's case*; or
>
> (iii) *support another party's case*. (Emphasis added.)

H **[45]** The provisions in O 24 r 3(4)(b) of the ROC 2012 are to be read disjunctively by the use of the word 'or'.

[46] I have weighed the requirements of justice to the parties in the action against each of the considerations put forward by D1. In my judgment, on balance, it is fair and just that the systematic and efficient administration of justice be better served by ordering discovery. Accordingly, being inclined, I exercised my discretion to allow encl 135.

I

Enclosure 135 allowed.

Reported by Dzulqarnain Ab Fatar